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Charles W. Wolfram

Cornell Law School, charlesw.wolfram@yahoo.com

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Barriers to Effective Public Participation in Regulation of the Legal Profession

Charles W. Wolfram*

I. INTRODUCTION

Speaking very generally, the history of the American bar may be said to have passed through three relatively quiescent stages and may now have entered a turbulent fourth. First, in the colonial period, lawyers appeared in communities primarily as documentary scriveners and occasionally as representatives of litigants in local courts. Although lawyers began to play more important roles as the pace of economic and political activity increased in the colonies during the eighteenth century, particularly as the Revolution approached, they seem to have lacked much cohesion or group identity.¹ In the second period, roughly from 1770 to 1870, lawyers' political opportunities were enlarged as the courts became increasingly active in the development of constitutional and common law. Legislative bodies frequently relied on lawyers for assistance in negotiating and drafting constitutions and legislation. At the end of this period, group identification was strengthening among lawyers at the local level.² During the third period, the century from 1870 to approximately 1970,³ the

* Professor of Law, University of Minnesota. Grateful acknowledgment is made to Richard W. Wilson (1979 candidate for the J.D. degree at the University of Minnesota Law School) for valuable research assistance. Thanks are also due to several colleagues, particularly J. Morris Clark, for constructive criticism of an earlier version of this Article presented to a faculty colloquium at the University of Minnesota Law School.

1. See C. WARREN, *A HISTORY OF THE AMERICAN BAR* 3-8, 16-18 (1911). See generally Boden, *The Colonial Bar and the American Revolution*, 60 MARQ. L. REV. 1 (1976). On the occasional organization of lawyers into local bar meetings on the eve of the American Revolution, see R. POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 163-73 (1953); C. WARREN, *supra* at 83-88, 98, 200-03.

2. See generally R. POUND, *supra* note 1, at 177-219. Legal historians have traditionally viewed the time of Jackson and the decades following as a period during which the American bar was at a very low state. See 2 A. CHROUST, *THE RISE OF THE LEGAL PROFESSION IN AMERICA* 155-61 (1965); H. DRINKER, *LEGAL ETHICS* 19-20 (1953); R. POUND, *supra* note 1, at 223-42. Dean Pound, for example, characterized the period from 1836 to 1870 as an "era of decadence." See *id.* at 223. More recently, however, the theory has been advanced that the state of the legal profession in the Jacksonian era was little different from that of preceding periods. See M. BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876*, at 137 (1976).

3. The dates selected are not precise. The year 1870 is used because it was the year in which the first significant local bar association still in existence, the Association of the Bar of the City of New York, was founded. See R. POUND, *supra* note 1, at 254-55. The year 1970 is chosen because it was the first year that the ABA Code of Professional Responsibility became effective and the year of publication of the widely

solo, general practice faded from predominance as the typical work of lawyers increasingly became oriented toward large firms and specialization. During this period, lawyers developed an increasingly efficient form of group identification, discipline, and political power through local and national bar associations and through the courts.

For most of this third period, lawyers and bar groups could rest content that only the courts would attempt to exercise any regulatory power over lawyers. Under the inherent powers doctrine⁴ the courts warned the legislative and executive branches off the field of bar regulation, sometimes striking down as unconstitutional attempts by outsiders to influence the behavior of lawyers.⁵ Meanwhile, the standards for self-regulation that were developed by judges and lawyers from within the legal profession took the form of vaguely worded "ethical" prescriptions.⁶ Under these ethical codes the bar regulated for itself the size of fees, the degree of competition within the profession, the duties owed to clients, the extent of aggressiveness that was permissible in advocacy and other representations,⁷ and, in elaborate⁸ but now increasingly archaic⁹ detail, the etiquette of getting business. Attempts from outside the profession to question these regulations were traditionally met with the insistent arguments that the intricacies of law and its practice required that only legal experts attempt to deal with such subjects¹⁰ and that ultimately the inherent powers

acclaimed and very critical Clark Report (named for the chairman of the committee that issued it, retired Justice Tom Clark of the United States Supreme Court) on the state of attorney discipline in the United States. See AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970) [hereinafter cited as CLARK REPORT].

4. See text accompanying notes 69-74 *infra*.

5. See note 74 *infra* and accompanying text.

6. See text accompanying notes 25-28 *infra*.

7. See generally Pirsig, *Legal Ethics*, in 10 MACROPAEDIA, NEW ENCYCLOPEDIA BRITANNICA 777-79 (15th ed. 1975).

8. See, e.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101 (publicity in general), DR 2-102 (advertising), DR 2-103 (recommendation of professional employment, including regulation of group legal services), DR 2-104 (suggestion of need for legal services). Although the 1908 Canons regulated subjects other than competitive practices, most of the attention of ethics committee interpretative opinions and commentators was focused upon their restrictions in this area. See Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 255-56 (1968).

9. The advertising prohibitions in the ABA Code were substantially undermined by the decision of the United States Supreme Court in *Bates v. State Bar*, 433 U.S. 350 (1977). *Bates* held that lawyers in a legal services organization had a first amendment right to communicate some bare essentials concerning their practice through local newspaper advertising. The Supreme Court has drawn the line, however, at person-to-person solicitation of clients. See *Ohralik v. Ohio State Bar Ass'n*, 98 S. Ct. 1912 (1978).

10. See note 39 *infra* and accompanying text.

doctrine precluded any group but the judiciary from actively regulating the profession.

It seems evident that a fourth stage in the history of the American bar has begun—a stage in which the bar increasingly will become the object of public scrutiny through nonjudicial, and thus more explicitly political, regulation. In the view of some critics, this development will be the bar's comeuppance for years of successful cartelizing. By this view, the bar eventually may come to be regarded as simply another private-interest trade group operating near, or beyond, the limits of antitrust and similar laws.¹¹ The recent increase in regulatory attention to the bar probably is a political manifestation of a very widely shared view, at least among nonlawyers, that the legal product is seriously defective, that consumers of justice are

11. See S. TISHER, L. BERNABEL, & M. GREEN, *BRINGING THE BAR TO JUSTICE* (1977) (comparative study of six bar associations by Public Citizens, Inc., a Nader group); Falk, *On the Defensive: Lawyers Lose Ground as Outside Regulation of Profession Grows*, Wall St. J., Aug. 17, 1977, at 1, col. 1. Criticism of the organized bar for its anticompetitive efforts is not new. In 1950, no less a critic than Willard Hurst taunted the organized bar for its new-found interest in "ethics" that had produced substantial restrictions on economic competitors at the beginning of the Depression and that generally seemed overly concerned with matters of economic aggrandizement. See J.W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAWMAKERS* 323-33 (1950). See also J. CARLIN, *LAWYERS' ETHICS* 180 (1966); Sanders, *Foreword to Symposium—The "Unauthorized Practice of Law" Controversy*, 5 LAW & CONTEMP. PROB. 1, 2 (1938); Note, *Legal Ethics and Professionalism*, 79 YALE L.J. 1179, 1187 (1970).

The watershed development in application of economic regulatory laws to the legal profession was the Supreme Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). In *Goldfarb*, the Court held that minimum fee schedules maintained by a bar association were in violation of federal antitrust laws. More recently, the bar association entered into an agreement to settle the *Goldfarb* class action litigation for \$200,000. See *Virginia Bar Digs Deep to Pay Off on Goldfarb*, B. LEADER, January-February 1977, at 11. Prior to *Goldfarb*, the Justice Department had filed suit challenging the minimum fee schedule maintained by the Oregon bar. See *United States v. Oregon State Bar*, 405 F. Supp. 1102 (D. Ore. 1975) (case moot on bar association's withdrawal of fee schedule and announced intent to refrain from future fee restrictions); *United States v. Oregon State Bar*, 385 F. Supp. 507 (D. Ore. 1974) (denial of defendant's motion to dismiss). Since *Goldfarb* a number of private litigants have filed suits against bar associations based on alleged violations of economic regulatory laws. See, e.g., *Surety Title Ins. Agency, Inc. v. Virginia State Bar*, 431 F. Supp. 298 (E.D. Va. 1977) (possible antitrust violation in issuance of advisory opinions on unauthorized practice of law), *vacated and remanded*, 571 F.2d 205 (4th Cir.), *cert. denied*, 98 S. Ct. 2838 (1978); *Person v. Association of the Bar of the City of New York*, 414 F. Supp. 144 (E.D.N.Y. 1976) (broad attack on prohibitions on contingent fees for expert witnesses), *rev'd*, 554 F.2d 534 (2d Cir.), *cert. denied*, 98 S. Ct. 403 (1977). Activists have read *Goldfarb* broadly as suggesting the vulnerability of bar-supported rules, such as those on solicitation, payment of referral fees, persuading clients to change representation, and similar restrictive rules. See, e.g., Francis & Johnson, *The Emperor's Old Clothes: Piercing the Bar's Ethical Veil*, 13 WILLAMETTE L.J. 221 (1977); Rigler, *Professional Codes of Conduct After Goldfarb: A Proposed Method of Antitrust Analysis*, 29 ARK. L. REV. 185, 187 (1975).

receiving less than their due—often at the enrichment of attorneys—and that bar trade groups and the courts have lacked the power or will to deal with a resulting social crisis in the delivery of legal services.¹²

Pressures from outside the organized bar for reform within the legal profession focus on several areas.¹³ The chief reforms sought are improvements in the availability of legal services to the poor and the middle class, improvements in the competency of lawyers, lower legal fees for many kinds of services, better information about lawyers to permit prospective clients to shop among lawyers for the best quality services at the lowest cost, better accountability of lawyers to clients, better financial protection of clients against lawyers' neglect and defalcations with client funds, and improvements in the adversarial system to remove unnecessary delay, expense, and unpleasantness from legal proceedings.

The groups creating the pressure for these and similar reforms are numerous and in combination appear potent. Consumer groups

12. While empirical proof of contemporary public dissatisfaction with the legal profession is limited, periodic surveys of public attitudes toward various professional and business groups indicate that lawyers have chronically finished badly in the standings, and their showing has been even worse since Watergate. See Burbank & Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFFOLK L. REV. 66, 67 (1974) (Harris polls); N.Y. Times, Aug. 22, 1976, at 32, col. 7 (Gallup poll). The self-image of lawyers, however, may be quite different. A recent poll of ABA members revealed that lawyers view themselves only below elected public officials and physicians in "degree of public responsibility." See *Law Poll: Organized Bar and Public Issues: Majority Wants More Activism*, 64 A.B.A.J. 42, 43 (1978). On the other hand, results of another ABA study recently released indicate that 59% of the studied population of clients thought that lawyers were too slow; 30% felt that lawyers needlessly complicated matters; 50% complained of a lack of effective communication with their lawyer; and 68% felt that lawyers charged more for their services than they were worth. See Minneapolis Tribune, Feb. 12, 1978, § A, at 4, col. 1. The President of the United States has recently added his voice to those broadly critical of lawyers and their organizations. See N.Y. Times, May 5, 1978, at 1, col. 5 (report of President Carter's speech to the Los Angeles Bar Association).

Historical public distrust of the legal profession is well-documented. See, e.g., M. BLOOMFIELD, *supra* note 2, at 32-58; D. MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 1-15 (1973); C. WARREN, *supra* note 1, at 214-24. See generally Pound, *The Lay Tradition as to the Lawyer*, 12 MICH. L. REV. 627 (1914).

13. Outside pressures for reform generally have concentrated on the availability, quality, and price of legal services and upon the extent to which the adversarial system of justice employed by courts and lawyers is capable of producing socially acceptable results. See, e.g., *The Effect of Legal Fees on the Adequacy of Representation: Hearing Before the Subcomm. on Representation of Citizen Interest of the Senate Judiciary Comm.*, 93d Cong., 1st Sess. (1973); Green, *The Gross Legal Products: How Much Justice Can You Afford?*, in VERDICTS ON LAWYERS 63 (R. Nader & M. Green eds. 1976). For examples of criticisms of the excesses of lawyers in the adversary system, see A. STRICK, *INJUSTICE FOR ALL* (1977); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975).

that have been effective in other areas recently have demonstrated great and critical interest in the legal profession.¹⁴ The Justice Department through two administrations has been increasingly adamant in its view that some of the regulations of the legal profession are economically harmful to consumers of legal services and violate national standards on competitive practices.¹⁵ This position now has ripened into large-scale Justice Department attacks in court under the federal antitrust laws.¹⁶ Some lawyers assert that these pressures are so substantial that they will threaten the bar's traditional self-regulation unless the legal profession takes effective action.¹⁷

The series of events popularly known as Watergate is thought to have created immense pressures on lawyers to clean their own house.¹⁸ Yet the Watergate housecleaning may have spent itself within the legal profession on the discipline of the major attorney-actors in the episode.¹⁹ After five years, reformist elements within the

14. See, e.g., *Consumers Union of United States, Inc. v. ABA*, 427 F. Supp. 506 (E.D. Va. 1976) (three judge panel), *vacated mem. sub. nom. Consumers Union of United States, Inc. v. Virginia State Bar*, 433 U.S. 917 (1977); Nader, *Overview*, in *VERDICTS ON LAWYERS*, *supra* note 13, at vii-xviii.

15. See, e.g., Lynch, *FTC Is Studying State, Bar Group Rules that Limit Lower-Priced Legal Services*, Wall St. J., Dec. 22, 1977, at 10, col. 2 (Federal Trade Commission investigation into state court and bar restrictions on group legal services with possible proposals for federal legislation to end the restrictions); *Bar Associations That Preclude Advertising by Law Firms May Violate Antitrust Laws*, [1975] ANTI-TRUST & TRADE REG. REP. (BNA) No. 720, at A-7 (remarks of U.S. Deputy Assistant Attorney General Bruce B. Wilson); *Justice Department Continues Its Contentions that the Houston Amendments Raise Serious Antitrust Problems*, 60 A.B.A.J. 1410 (1974) (report of remarks by Thomas E. Kauper, U.S. Assistant Attorney General, and Joe Sims, Special Assistant to the U.S. Assistant Attorney General); *Justice Department Eyes New Bar Targets*, 63 A.B.A.J. 299 (1977).

16. See *United States v. ABA*, No. 76-1182 (D.D.C., filed June 25, 1976); *United States v. Oregon State Bar*, 405 F. Supp. 1102 (D. Ore. 1975). The text of the complaint in *United States v. ABA* appears in *Justice Department Charges Code Advertising Provisions Violate Federal Antitrust Laws*, 62 A.B.A.J. 979, 980 (1976). The text of the answer appears in *Association Files Answer in Civil Antitrust Suit Brought by the United States*, 62 A.B.A.J. 1179 (1976) [hereinafter cited as *Answer*].

17. See, e.g., Brink, *Who Will Regulate the Bar?*, 61 A.B.A.J. 936 (1975); Manning, *If Lawyers Were Angels: A Sermon in One Canon*, 60 A.B.A.J. 821 (1974); Sheran & Harmon, *Minnesota Plan: Mandatory Continuing Legal Education for Lawyers and Judges as a Condition for the Maintaining of Professional Licensing*, 44 *FORDHAM L. REV.* 1081, 1083, 1086-87 (1976). See also Wright, *Self-Discipline of the Bar: Theory or Fact?*, 57 A.B.A.J. 757 (1971).

18. See Hertzberg, *Watergate: Has the Image of the Lawyer Been Diminished?*, 79 *COM. L.J.* 73 (1974); Waltz, *The Unpopularity of Lawyers in America*, 25 *CLEV. ST. L. REV.* 143 (1976); Waltz, *Thoughts on the Legal Profession's Public Image*, 23 *DE PAUL L. REV.* 651 (1974).

19. A scorecard on the progress of efforts to impose discipline on the most visible lawyer-members of the Nixon White House appears in *N.O.B.C. Reports on Results*

bar can point to few tangible accomplishments traceable to the purgative effects of Watergate,²⁰ and lawyers generally may have lost the impetus for reform, feeling that their profession is past the worst of the pointed antilawyer sentiments that seemed to have been generated by the high percentage of lawyers among Watergate's doers of dirty tricks.²¹

Watergate, however, may prove to have been only a heightened moment in a continually growing demand for external regulation. Current expressions of public dissatisfaction may reflect public attitudes—long predating Watergate and fully capable of surviving its demise—that the legal profession has possessed too free a hand in regulating itself and important elements of the broader legal system in the profession's own narrow interests. Indeed, the failure of the legal profession after Watergate to take major steps to improve internally its regulatory processes in ways thought necessary by much of the public may be regarded by many nonlawyers as proof of the failure of self-regulation.

This Article does not argue that each of the reform measures pressed by persons and interest groups critical of the legal profession is necessarily welcome, efficacious, or based on an accurate perception of the social and economic factors underlying the delivery of legal services in the United States. But, assuming for the sake of further discussion that some reformers are working with sympathetic motives toward worthy objectives, the Article will canvass the legal and institutional barriers created or maintained by the legal profession

of Watergate-Related Charges against Twenty-nine Lawyers, 62 A.B.A.J. 1337 (1976). For more recent developments, see *In re Mitchell*, 98 S. Ct. 387 (1977) (disbarment of former Attorney General John N. Mitchell from the United States Supreme Court); *In re Erlichman*, 98 S. Ct. 387 (1977) (disbarment of former presidential assistant John D. Erlichman).

20. One tangible result traceable in part to the influence of Watergate reactions may be the current call among leadership of the ABA to rewrite substantially the Code of Professional Responsibility. See, e.g., Spann, *The Legal Profession Needs a New Code of Ethics*, B. LEADER, November-December 1977, at 2. A special Committee on the Evaluation of Professional Standards was recently appointed by the ABA to investigate questions that have been raised about the adequacy of the Code. See *Committee on Evaluation of Professional Standards Seeks Advice and Counsel of Members*, 64 A.B.A.J. 143 (1978). A contrary indication, suggesting waning bar vigor in the enforcement of the current standards, is the recent decline in the number of public discipline actions. See American Bar Ass'n, Press Release, No. 011978s (Jan. 21, 1978) (1977—503; 1976—614; 1975—573; 1974—419).

21. Legal historian and bar critic Jerold Auerbach believes that by the 1975 meeting of the American Bar Association the demands for reform of the legal profession had been dissipated, and Watergate had been transformed within the legal profession into a source of pride because of the role of prominent lawyers in pursuing Watergate offenders. See Auerbach, *The Legal Profession After Watergate*, 22 WAYNE L. REV. 1287, 1287-88 (1976).

that serve to blunt outside attempts to reform the legal profession, whether through efforts of nonlawyer groups or through the intervention of legislatures or administrative agencies. This survey will indicate that in order for significant reformist measures to be adopted, a wrenching institutional and doctrinal change will be required, involving either amendment of state constitutions, radical doctrinal reform by the courts themselves, or a major expansion of the powers of the national legislature and regulatory agencies.

II. ETHICS AND MYSTIFICATION²²

Two interrelated concepts have historically stood in the way of public participation in regulation of the legal profession. First, in marked contrast to the norms that control some other, nonprofessional working groups,²³ regulation of the legal profession has traditionally been asserted to be a matter of the "ethics" of legal practitioners. Second, it has been argued that the formulation and enforcement of lawyers' ethical norms involve such complex and technical detail that only skilled experts—lawyers themselves—should attempt to regulate the profession. In combination these arguments have been thought by lawyers and legal scholars to weigh heavily against participation by nonlawyers in the regulation of the legal profession.²⁴ On close examination, however, this part of the case for exclusive self-regulation is by no means overwhelming.

A. GOVERNANCE OF LAWYER BEHAVIOR BY "ETHICAL" RULES

It is at once a strength and a serious weakness of the traditional system for regulating attorney behavior that its norms for appropriate conduct are indeterminate. Despite two efforts to codify these

22. Mystification is a sociological description of attempts by professional groups such as lawyers to immunize themselves from outside control by asserting that their professional operations are so specialized and complex that outsiders cannot comprehend them. See, e.g., T. JOHNSON, *PROFESSIONS AND POWER* 42-43 (1972); Daniels, *How Free Should Professions Be?*, in *THE PROFESSIONS AND THEIR PROSPECTS* 41 (E. Freidson ed. 1973); cf. C. WARREN, *supra* note 1, at 223-24 (discussing popular belief of post-Revolutionary War American public that law was kept purposefully obscure by lawyers in order to protect their monopoly).

23. Personal service providers such as real estate brokers and organizations are fully regulated in many jurisdictions by special statutes dealing with licensure, minimum capitalization, bonding, and the like. See, e.g., A. AXELROD, C. BERGER, & Q. JOHNSTONE, *LAND TRANSFER AND FINANCE* 50 (1971).

24. See, e.g., Wade, *Public Responsibility of the Learned Professions*, 21 *LA. L. REV.* 130 (1960); Weckstein, *Training for Professionalism*, 4 *CONN. L. REV.* 409, 414-15 (1972).

norms²⁵—the Canons of Professional Ethics²⁶ and the Code of Professional Responsibility²⁷—it is still probably true that they are widely regarded as merely the “implicit or quasi-official rules” defining lawyers’ responsibilities.²⁸ The strength that this indeterminacy affords to a system of attorney discipline is that the task of assessing individual conduct is not hindered by possibly sterile exercises in codal exegesis.²⁹ Under broadly defined norms, attorney disciplinary agencies and courts can take a more direct and less technical approach to assessing an attorney’s conduct.

On the other hand, the inexactitude, and to some extent the tone, of the older Canons of Ethics and the current Code of Professional Responsibility may be taken to suggest that only gross violations of almost universally acknowledged lawyer norms will result in discipline. For the most part the norms would be perceived as self-policing,³⁰ with the main function of the Code being to offer guidelines to lawyers who may elect to ignore many of its heuristic statements without suffering anything more than the informal disapproval of some professional peers.³¹ Such an approach, if adopted

25. For the text of the 1908 Canons as amended prior to their replacement by the 1970 Code of Professional Responsibility, see AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS (1967).

26. See notes 47-50 *infra* and accompanying text.

27. See notes 51-54 *infra* and accompanying text.

28. See Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1081 (1976); Hazard, Book Review, 26 STAN. L. REV. 1227, 1228 (1974). See generally Teschner, *Lawyer Morality*, 38 GEO. WASH. L. REV. 789 (1970). Some traces of this “ethical” vocabulary survive in the Code, see, e.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-15, EC 2-16, but as a whole the Code was designed to serve more than a hortatory function, see note 31 *infra*.

29. Indeterminacy in the Code may also serve the purpose of leaving persons subject to it to their own moral resources in thinking about the appropriateness of professional conduct. Such provisions may be designed with the view that private moral instincts may provide a better guarantee of appropriate conduct than specifically drafted provisions.

30. This ease of application, of course, is purchased at the price of an increased risk of arbitrary imposition of sanctions upon practitioners who are on the fringes of the profession in terms of power and thus less able to influence the scope and application of regulations. See, e.g., J. CARLIN, *supra* note 11, at 162; Shuchman, *supra* note 8, at 245, 250-66.

31. This hortatory function is not, of course, the avowed design of the Code. See note 35 *infra*. Yet violation of many of its purportedly mandatory norms does not in fact result in disciplinary action. In some instances this failure to act is a matter of established policy. A notorious example is DR 6-101, which prohibits attorney incompetence. Many bar disciplinary agencies take the position that individual instances of attorney incompetence are not grist for their mill. See generally R. MALLIN & V. LEVIT, *LEGAL MALPRACTICE* 17-20 (1977). This inaction occurs within a legal system whose highest judicial officer has claimed that a fair appraisal of lawyer performance in litigated cases would establish that one-half of all practicing trial attorneys are incompetent. See *Inept Lawyers Are the Bane of the Law*, N.Y. Times, Dec. 4, 1977, § 4, at 11, col. 1 (report of testimony of Chief Justice Warren Burger before the Royal Commission on Legal Services in London, England, in July 1977). The remarks of the Chief

by bar disciplinary agencies, would tend to immunize substantial areas of attorney conduct from effective control.³² Outside reformers would thus be unable to effect meaningful regulation of attorney conduct through amendments to the Code.³³ Moreover, it is predictable that within many of these immunized areas attorneys and nonattorneys would differ sharply about the shape of the rules that should apply and the sanctions that should be employed to coerce compliance.

One manifestation of this situation is widespread ignorance among practicing attorneys of the provisions of the Code of Professional Responsibility.³⁴ Apparently, attorneys who would blush at their inability to recite by heart major provisions of the Internal Revenue Code or other codes relevant to their field of specialized practice suffer only slight embarrassment when confessing ignorance of the contents of the Code of Professional Responsibility. The attitude of many lawyers seems to be that, because the great mass of attorney regulations are "ethical"—which in this popular sense means inchoate, indeterminate, and endlessly debatable at a high and largely unhelpful level of generality—the Code contains little that is really worth knowing specifically.

There are indications, however, that some courts and lawyers are coming to regard the conduct of lawyers as fully subject to regulation by the "law" of the Code of Professional Responsibility.³⁵ Under this

Justice caused a flap that included a motion in the ABA House of Delegates, which was defeated, calling upon the Chief Justice to substantiate his accusation. *See Bar Votes Down Attempt to Force Burger to Substantiate Criticism*, N.Y. Times, Feb. 14, 1978, at 1, col. 3.

Part of the explanation for nonenforcement may be traceable to overbreadth and over-uniformity in the Code. It was claimed that the Canons were ineffective because they did not deal discretely with the different problems of antisocial lawyer behavior that were produced by different kinds and degrees of pressures against conformance on lawyers in varying marginal practices. *See* J. CARLIN, *supra* note 11, at 5-7; J. CARLIN, *LAWYERS ON THEIR OWN* 155-57 (1962). The Code may suffer from a similar problem. *See* Note, *supra* note 11, at 1196-97.

32. The 1970 Clark Committee report criticized the practice by bar disciplinary agencies of treating certain serious attorney defaults as involving only private disputes between attorney and client. *See* CLARK REPORT, *supra* note 3, at 97-100. *See also* Marks & Cathcart, *Discipline Within the Legal Profession: Is It Self-Regulation?*, 1974 U. ILL. L.F. 193.

33. In addition to the problem that reformers might confront in obtaining enforcement of existing norms, significant obstacles would also confront an attempt by nonlawyer reformers to participate in the process of drafting amendments to the existing Code in areas where the present wording is deemed insufficient. *See* note 63 *infra* and accompanying text.

34. *See* Burbank & Duboff, *supra* note 12, at 105; *cf.* CLARK REPORT, *supra* note 3, at 1 (attitude of attorneys toward disciplinary enforcement "ranges from apathy to outright hostility").

35. The first, tentative step toward a more regulatory, less "ethical" statement

view, many of the prescribed norms are held to be mandatory,³⁶ and departures from their terms result more frequently in the imposition of formal sanctions.³⁷ Instead of a document that attorneys are urged to heed merely for the sake of pride, self-improvement, and the betterment of the profession, the Code becomes necessary reading for those well-advised attorneys who wish to avoid disciplinary action.

Only under this apparently emerging view of attorney regulation as "legal," instead of merely "ethical," can strongly held nonlawyer views about proper attorney behavior be effectively expressed by amendment of the Code of Professional Responsibility. So long as the Code continues to be regarded simply as a toothless document of good but sometimes quaint advice, even revisions of the document that embody strongly held nonlawyer views could be ignored with impunity. Effective change, therefore, can only be accomplished through imposition of Code norms that are enforceable or, failing that, by enacting statutes that incorporate appropriate norms.³⁸

B. SUPERIOR KNOWLEDGE AND MYSTIFICATION

An argument frequently encountered in discussions of regulation of the legal profession is that only lawyers should participate in the

of lawyer norms was the division of provisions in the Code of Professional Responsibility into Ethical Considerations—which state the higher "objectives toward which every member of the profession should strive" but as to which no formal normative consequences attach, *see* ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preliminary Statement—and Disciplinary Rules, violation of which may result in the imposition of discipline, *see id.*

36. In fact, there is reason to believe that some Ethical Considerations may be given occasional mandatory effect even though their proscriptions are not duplicated in specific terms in Disciplinary Rules. *See, e.g., In re* January 1976 Grand Jury, 534 F.2d 719, 729 (7th Cir. 1976); *Estate of Weinstock*, 40 N.Y.2d 1, 6, 351 N.E.2d 647, 649, 386 N.Y.S.2d 1, 3 (1976); *In re R.*, 276 Or. 365, 367 & n.1, 554 P.2d 522, 523 & n.1 (1976) (*per curiam*). *See also* D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* 114-15 (1974).

37. *See Lawscope: Tighter Discipline Shown by Statistics*, 63 A.B.A.J. 24 (1977) (report of 76% increase in disbarments, and even larger increases in suspensions and public reprimands, between 1973 and 1975). *But cf.* note 20 *supra* (recent decline in the number of public discipline actions).

38. A further problem, of course, is that of assuring that bodies administering stated norms are sympathetic to their policy objectives. It seems doubtful whether bar disciplinary agencies as presently constituted can serve this function, at least with respect to reform measures that are not supported by a large segment of the bar. Reformers within the legal profession typically regard the question of bar reform as basically a matter of the wrong attorneys being in control of the profession's rulemaking and rule-enforcing bodies. Reform, for them, means replacing the troglodytes with more progressive attorneys. Others, however, argue that the inward vision of the legal profession probably will not be affected substantially unless nonlawyers intrude significantly into the governance of the legal profession. *See, e.g.,* Baron, *Book Review, JURIS DOCTOR*, July-August 1976, at 17.

process because only lawyers are sufficiently learned in the law to make a proper evaluation of professional behavior.³⁹ To the extent that this argument asserts that appointing laypersons to Code drafting or enforcement bodies would be inappropriate because the public lacks the specialized knowledge that lawyers possess, it seems to be composed of several elements, each of questionable validity.

First, the argument assumes that drafting and disciplinary bodies are in fact frequently called upon to deal with matters that require specialized legal knowledge. Most professional activities requiring regulation, however, are very likely not of such a sophisticated nature. The mine run of lawyer discipline matters (for example, defalcation with client funds, charging clearly excessive fees, or inordinate delay in handling client matters because of alcoholism, bad habits, or overwork) probably involves straightforward defaults on readily understood legal norms that lawyers and nonlawyers could handle with nearly equal facility and sensitivity.

Second, the "specialized knowledge" argument assumes that any necessary specialized knowledge cannot be acquired efficiently by nonlawyers. In fact, however, the nonlawyer could be educated in the specialized subject matter,⁴⁰ or, perhaps equally availing and of wider benefit, the apparently complex legal matter might be demystified⁴¹ so that lawyer and public alike could become its master.

Third, the "specialized knowledge" argument assumes that lawyers on ruledrafting and grievance committees possess and frequently employ the specialized knowledge that nonlawyers lack. While it is obvious that the average lawyer will know more law than the average nonlawyer, this argument is convincing only if it refers to law so arcane that it cannot readily be apprehended by nonlawyers of normal intelligence. That the average lawyer is any more able and accustomed than a nonlawyer to ascend instinctively to heights of such penetrating insight seems problematical.⁴² Moreover, one need

39. See, e.g., CLARK REPORT, *supra* note 3, at 136-37; Arkin, *Self-Regulation and Approaches to Maintaining Standards of Professional Integrity*, 30 U. MIAMI L. REV. 803, 825 (1976); Weckstein, *supra* note 24, at 414-15.

The same "specialized knowledge" argument pervades other areas (for example, medicine, engineering, pharmacy, surveying, cosmetology, horseshoeing) in which the objects of professional regulation claim the exclusive power to control their own conduct. See, e.g., T. JOHNSON, *supra* note 22, at 42-43; Daniels, *supra* note 22, at 40-42.

40. See Note, *The Legal Profession's Attempt to Discipline Its Members: A Critique of the Clark Report*, 1970 UTAH L. REV. 611, 617.

41. See note 22 *supra*.

42. Many nonlawyers, for example, would hardly find it beyond their accustomed mental range to make significant clarifying improvements in the text of the Code of Professional Responsibility. To be fair to the drafters of the Code, much of the poor draftsmanship undoubtedly reflects the bar's general desire to avoid dealing clearly with difficult issues by confronting them head-on. The considerations of politics

not disparage attorneys to assert that nonlawyer participants chosen for their perception and knowledge of the affairs of life could serve as adequately as many lawyers.

Instead of resting on attorneys' vastly superior knowledge, the argument for exclusive attorney control might actually be based on a fear that nonlawyers would have a value system that is inappropriate for regulation simply because they are not lawyers. For example, the rather predictable belief of nonlawyers that lawyers are too concerned with advertising and too little concerned with attorney incompetence⁴³ could be dismissed by lawyers on the ground that nonlawyers have an insufficient appreciation of the values of the legal profession. It is much more likely, however, that nonlawyers know of those values and question or reject their hegemony. Therein lies the most potent reason for public involvement in the operation of the internal regulatory system employed by lawyers. The goals and priorities of the bar on many important issues may not be shared by members of the public. Excluding all but lawyerly opinions on such controverted matters is indulging in sheer powerplay, designed to prevent competing value systems from gaining ascendancy on matters of public concern.⁴⁴ Locking out the views of the public may further the narrow interests of lawyers, but it cannot be defended on the ground of superior, specialized knowledge.

Nevertheless, using arguments such as these the legal profession over the last century has developed a system of self-regulation that is controlled almost exclusively by lawyers and judges. An examination of this system and of the traditional political and legal arrangements that have held it in place gives some notion of the massive obstacles that stand in the way of effective public participation in the regulation of the legal profession.

III. THE CURRENT REGULATORY AND LEGISLATIVE PROCESS

The last century has witnessed a steady growth in the extent to which the organized legal profession has exercised disciplinary power over attorneys. Around 1870, disciplinary control was apparently dispersed among local courts and exercised only sporadically, taking the

that lead to such drafting are precisely the kind of matters on which nonlawyers are entitled to be heard.

43. See Lobe, *Confessions of a Non-lawyer on a Discipline Board*, B. LEADER, November 1975, at 17, 18-19; *Professional Responsibility and Discipline*, BENCH & B. MINN., January 1976, at 6, 7 (comments of retiring nonlawyer member of Minnesota State Board of Professional Responsibility).

44. See, e.g., *Lawscope: Bar 'Attacks' Justified? Bar Leaders' Views Clash*, 63 A.B.A.J. 1193 (1977) (exchanges among bar officials).

form of very occasional disbarment proceedings against attorneys who had committed outrageous depredations.⁴⁵ The few existing local bar associations apparently exercised little power and had little part to play in lawyer discipline. When the American Bar Association (ABA) was organized in 1878, little attention was paid to the matter of devising a uniform set of standards to govern lawyer conduct.⁴⁶ The first major development occurred in 1908 with adoption of the ABA Canons of Ethics.⁴⁷ The Canons at first had little noticeable effect. But beginning in the late 1920's organized bar groups in many states began a concerted drive to enforce some of its provisions, focusing primarily on "ambulance-chasing" by personal injury lawyers and the so-called "unauthorized practice" of law by such nonlawyers as real estate agents, notaries public, and accountants.⁴⁸ As a part of this effort, the bar associations convinced many courts to adopt the Canons as at least guidelines for lawyers and, upon suit by the bar, to impose discipline for serious departures from them.⁴⁹

The Canons were remarkably imprecise and incomplete.⁵⁰ In

45. See R. POUND, *supra* note 1, at 184-85, 242, 248.

46. The tenor of the documents recording the beginnings of the ABA suggests that substantive law reform and social conviviality in Saratoga Springs, the site of early ABA meetings, were the uppermost projects in mind. See *Proceedings of The Conference Called for the Purpose of Organizing a National Bar Association and of the First Annual Meeting of the American Bar Association*, 1 A.B.A. REP. 5, 16-19, 24 (1878). The ABA's Committee on Grievances scarcely functioned at all during the years 1878-1902. See E. SUNDERLAND, *HISTORY OF THE AMERICAN BAR ASSOCIATION* 22 (1953).

47. The history of the adoption of the Canons is traced approvingly in E. SUNDERLAND, *supra* note 46, at 110-12. For a contrasting view, see J. AUERBACH, *UNEQUAL JUSTICE* 40-53 (1976).

48. See J.W. HURST, *supra* note 11, at 313, 323-24; *Nationwide War on "Ambulance-Chasers"*, 14 A.B.A.J. 561 (1928); *Proceedings of the Fifty-Third Annual Meeting of American Bar Association*, 55 A.B.A. REP. 1, 94-95 (1930) (creation of Standing Committee on Unauthorized Practice).

49. The Canons of Ethics do not seem to have been adopted as directly authoritative by any state court during this early period. But several opinions declared that the state supreme court would look to the Canons as a persuasive source of guidance in attorney discipline cases, and attorneys were so advised. See, e.g., *Hunter v. Troup*, 315 Ill. 293, 302, 146 N.E. 321, 324 (1925); *In re McDonald*, 204 Minn. 61, 71, 282 N.W. 677, 682 (1938) (per curiam). *Contra*, *In re Clifton*, 33 Idaho 614, 196 P. 670 (1921). Among later decisions taking the "persuasive guidelines" approach, see *In re Connelly*, 18 App. Div. 2d 466, 240 N.Y.S.2d 126 (1963). During the years just prior to the adoption of the Code, some state supreme courts made the Canons of Ethics directly binding rules of attorney conduct. See, e.g., Minnesota Supreme Court Order of May 2, 1955, 241 Minn. xvii (1955). Even at the earlier stage, some state legislatures had enacted the Canons as law. See, e.g., *In re Arctander*, 110 Wash. 296, 188 P. 380 (1920).

50. According to the drafters of the Code, the imprecision of the Canons was the principal reason for redrafting them. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, Preface; Sutton, *Introduction to Symposium—The American Bar Association Code of Professional Responsibility*, 48 TEX. L. REV. 255 (1970). Complaints about the vague-

1964 a redrafting committee within the ABA was appointed, and it eventually reported a proposed rewriting of the ethical standards. The new standards, called the Code of Professional Responsibility, were adopted by the ABA House of Delegates, effective January 1, 1970. A highly organized campaign was launched from within the ABA to convince state supreme courts to adopt the Code as the official set of standards for lawyers.⁵¹ Contrary to the slow and spotty pattern of adoption of the Canons, the Code was an impressive success and was quickly adopted in every state but California.⁵² Yet the Code suffered from many of the same defects that were thought to make the Canons ineffective, primarily vagueness in key provisions⁵³ and an unduly restrictive treatment of group legal services and advertising.⁵⁴

With limited exceptions, the language of the Code of Professional Responsibility as adopted in the states is uniform, and a state-by-state examination of the variations supports the conclusion that few

ness of the Canons were frequent. *See, e.g.,* Starrs, *Professional Responsibility: Three Basic Propositions*, 5 AM. CRIM. L.Q. 17, 20 (1966) ("glittering generalities which, as someone has said, lack 'a body to kick and a soul to condemn'"); Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934) ("generalizations designed for an earlier era"). One court held that using a verbatim quotation from the Canons of Ethics as a supplemental jury instruction in a criminal case was reversible error because the jury was entitled to an understandable answer to its inquiry. *See State v. Zwillman*, 112 N.J. Super. 6, 16-17, 270 A.2d 284, 288-89 (1970).

51. *See* Special Committee to Secure Adoption of the Code of Professional Responsibility, *Report*, 97 A.B.A. REP. 268 (1972).

52. *See id.* At the time of the ABA committee's report, only Alabama, North Carolina, and California were listed as not having adopted the ABA Code. Alabama adopted the Code in late 1974. *See In re McDonald*, 292 Ala. 426, 428, 296 So. 2d 141, 142 (1974). The North Carolina bar had adopted, and the North Carolina Supreme Court had approved, the Code nearly a year earlier. *See* 283 N.C. 848 (1973).

Although the Code has not been adopted in California, it served as a model for the Rules of Professional Conduct promulgated by the California Supreme Court. *See* 14 Cal. 3d 1 (1975). In addition, many local California bar associations have adopted the ABA Code as part of their bylaws. *See, e.g.,* LOS ANGELES COUNTY BAR ASSOCIATION BYLAWS art. 13 (1976); SAN DIEGO COUNTY BAR ASSOCIATION AMENDED BYLAWS art. 14 (1976). Both California courts and California bar association ethics committees freely refer to the Code for guidance. *See, e.g.,* *City of Los Angeles v. Decker*, 18 Cal. 3d 860, 870-71, 558 P.2d 545, 551, 135 Cal. Rptr. 647, 653 (1977); LOS ANGELES COUNTY BAR ASS'N, OPINIONS, No. 360, reprinted in 52 L.A.B.J. 234 (1976).

53. *See, e.g.,* Levy, *Time to Review the Code*, 62 A.B.A.J. 225 (1976); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 870 (1977); Barnett, Book Review, 90 HARV. L. REV. 648, 651 n.13 (1977). *See also* note 20 *supra*.

54. *See, e.g.,* J. AUERBACH, *supra* note 47, at 286-88. The Code was criticized, even before it was finally adopted by the ABA, for its overly restrictive views on lawyer advertising. *See* Joost, *Professional Responsibility: The Missing Dimension*, TRIAL, June-July 1969, at 20. For the post-1970 ABA amendments on group legal services and lawyer advertising, see notes 60-61 *infra*.

of them would be of significant interest to nonlawyers.⁵⁵ To the extent that this uniformity is not explicable solely by universal support for the original text of the Code, its source must be sought in the relatively monolithic and centralized process by which the Code was generated and presented to the states for adoption.

This process is very similar to that by which amendments to the Code are adopted. Textual suggestions for amendments are presented first to the ABA Committee on Ethics and Professional Responsibility, a group composed entirely of ABA members, all lawyers, most in private practice.⁵⁶ Occasionally a suggested text is generated by another ABA committee,⁵⁷ but again the membership of the committee is almost inevitably composed of practicing lawyers. The suggestions approved by the Professional Responsibility Committee are submitted to the ABA House of Delegates for approval at one of its semi-annual meetings. The House is composed of lawyer-elected lawyer-delegates, primarily representing local and state bar associations. While gross generalizations are rightly suspect, the House of Delegates by self-description represents the interests of lawyers,⁵⁸ and the judgment that its decisions are strongly influenced by consideration of lawyers' self-interest would not be widely disputed.

The task of obtaining local adoption of the original version of the Code was assigned to a special ABA committee that coordinated the national effort.⁵⁹ The task of selling amendments to the local Code-enacting authorities, however, is assumed by local and state bar associations. The ABA's record in securing adoption of amendments by state supreme courts is less impressive than the acceptance rate of the original Code, perhaps because some of the amendments, especially those dealing with such issues as group legal services⁶⁰ and

55. See AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY, ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY (tent. ed. 1976) [hereinafter cited as ANNOTATED CODE].

56. See note 62 *infra*.

57. An instance of this occurred during the 1974 ABA debate in Houston over group legal services. The ABA Section on General Practice opposed the more liberal Code amendment favored by the ABA Ethics Committee and offered its own proposal. See AMERICAN BAR ASSOCIATION, SUMMARY OF ACTION AND REPORTS TO THE HOUSE OF DELEGATES: MIDYEAR MEETING 118 (1974); cf. *Lawscope: Fair-trial/Free-press Standards Proposed*, 64 A.B.A.J. 325 (1978) (proposal of ABA Adjunct Committee on Fair Trial/Free Press to ABA Standing Committee on Association Communications to amend the Code on the subject of lawyer comments on pending litigation).

58. See *The History of the House of Delegates*, 39 A.B.A.J. 716 (1953).

59. See note 51 *supra* and accompanying text.

60. The controversy over group legal services in the ABA was most immediately stimulated by the decision of the Supreme Court in *United Transp. Union v. State Bar*, 401 U.S. 576 (1971), which affirmed the right of a union to offer legal services to members from a selected group of lawyers. Antitrust officials had expressed the view

advertising,⁶¹ seem to cut closer to the bone of economic competition among attorneys.

Several features of this general scheme for enactment of lawyer rules stand out. First, the entire process, from its beginning in the ABA to eventual adoption in the states, is controlled by lawyers.⁶² The public has neither a formal role nor any measurable indirect impact on the final shape of the Code.⁶³ Moreover, a major part of the legal profession may not even be directly represented in the adop-

that prohibitions against group legal services also raised antitrust implications. The issue caused controversy at three successive meetings of the ABA House of Delegates. Before the last of these meetings, the issue was highlighted by critical hearings before a congressional committee. See *The Organized Bar: Self-Serving or Serving the Public? Hearing Before the Subcomm. on Representation of Citizen Interests of the Senate Comm. on the Judiciary*, 93d Cong., 2d Sess. (1974) [hereinafter cited as *Organized Bar Hearings*]. See generally L. DEITCH & D. WEINSTEIN, *PREPAID LEGAL SERVICES* 21-22 (1976); Meeks, *Antitrust Aspects of Prepaid Legal Services Plans*, 1976 AM. B. FOUNDATION RESEARCH J. 855, 887-88. For a listing of states that have adopted the 1975 group legal services revisions to the Code, see ANNOTATED CODE, *supra* note 55, at 33, 66-67.

61. The original prohibitions against lawyer advertising in the 1970 Code have been grudgingly liberalized by the 1976 "phonebook" extension and the 1977 "laundry list" proposal. The latter was in direct response to the Supreme Court decision in *Bates v. State Bar*, 433 U.S. 350 (1977). Before the *Bates* decision the 1976 liberalization had been rejected in at least two states. See 44 U.S.L.W. 2591 (1976) (New York State Bar Association rejection); *Virginia Is First State to Reject ABA Standards on Lawyer Advertising*, [1976] ANTITRUST & TRADE REG. REP. (BNA) No. 762, at A-1.

The Antitrust Division filed suit against the ABA because of alleged antitrust infringements caused by overly restrictive prohibitions on lawyer advertising. See *United States v. ABA*, No. 76-1182 (D.D.C., filed June 25, 1976). As part of its response, the ABA asserted that the Code and its amendments are of no effect until approved by appropriate authority in each jurisdiction. See *Answer*, *supra* note 16.

62. The membership of the ABA's Standing Committee on Ethics and Professional Responsibility is and always has been composed entirely of lawyers. According to the constitution of the ABA, only lawyers may be considered for regular membership in the association and only members of the association are considered for service on ABA committees. See AMERICAN BAR ASSOCIATION CONST. art. 3, § 3.1; AMERICAN BAR ASSOCIATION BYLAWS art. 30, §§ 30.3, .7. Similar patterns exist in most states. In several jurisdictions, however, nonlawyers recently have been appointed to some influential bar committees. See notes 87-89 *infra* and accompanying text.

At least interstitially, the meaning of the Code can also be affected by interpretative opinions issued by bar association ethics committees in response to questions submitted to them. But nonlawyers (and even nonmember lawyers) typically are barred from asking the questions or from propounding an answer. See, e.g., 1 AMERICAN BAR ASSOCIATION, INFORMAL ETHICS OPINIONS 5-6 (1975) (Composition and Jurisdiction and Rules of Procedure of ABA Committee on Ethics and Professional Responsibility).

63. In most jurisdictions, the only formal point in the process of adoption at which the nonlawyer public could have an impact is the point at which the state supreme court considers whether to adopt proposed Code amendments. Nonlawyers presumably could file amicus statements opposing unwanted Code provisions, but this seems to be a course not pursued, perhaps because of its apparent futility.

tion process.⁶⁴ Second, the norms produced by this process predictably possess a "lowest common denominator" quality. Because of the logrolling and compromise that take place within the national ABA organization, the final form of most rules seems designed not to offend any strongly held point of view within the legal profession. A suggested provision that is likely to generate controversy in the ABA House of Delegates or in many states is rare.⁶⁵ Third, as one might suspect from this scheme of adoption, in instances where the prerogatives of lawyers come into conflict with the interests of clients or society, lawyer interests tend to be preferred.⁶⁶

64. At a point in 1970, 143,456 lawyers and judges were enrolled as ABA members. See Standing Committee on Membership, *Report*, 96 A.B.A. REP. 652 (1971). The 1970 national census reported 355,242 lawyers in the United States. See U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 163 (1975). Thus, only about forty percent of the country's lawyers were reported as ABA members in 1970. One estimate places the percentage of ABA membership at fifty percent of licensed lawyers as of July 1, 1975. See Sachs, *Delegates, Divisions, Committees . . . How the ABA Works*, DISTRICT LAW., Fall 1976, at 8.

It is probably also true that the membership of the ABA does not adequately represent each of the principal types of law practitioners in the United States. ABA members tend to be predominantly from "establishment" forms of law practice while nonmembers tend to be solo practitioners earning lower incomes. See generally J. CARLIN, *supra* note 31, at 175-82; Heinz, Laumann, Cappell, Halliday & Schaalman, *Diversity, Representation, and Leadership in an Urban Bar: A First Report on a Survey of the Chicago Bar*, 1976 AM. B. FOUNDATION RESEARCH J. 717, 728-30. Decisions reached within the ABA may not accurately represent the views of its own membership. Some ABA members have recently charged that the ABA House of Delegates is malapportioned, giving undue weight to the votes of delegates from states with small lawyer populations. See Barnard, *A Proposal to Reorganize the House of Delegates*, 64 A.B.A.J. 8 (1978).

65. The Code was very quickly adopted in most jurisdictions after promulgation by the ABA, and the discussions that accompanied its approval were comparatively bland. See Special Committee to Secure Adoption of the Code of Professional Responsibility, *Report*, 97 A.B.A. REP. 740 (1972). The ABA's proposed Code amendments dealing with group legal services and lawyer advertising, however, have met with lively controversy and widespread partial or total rejection in the states. In each instance the versions approved by the ABA House of Delegates (which gave them no authoritative force without subsequent adoption in the states) are explicable on political and public relations grounds. The group legal services amendments were probably motivated largely by a desire to comply with recent Supreme Court decisions holding that stricter forms of regulation were unconstitutional, by a desire to respond to pressures from federal antitrust regulators, and by the felt need to blunt the efforts of reformers in Congress who were proposing federal legislation dealing with legal service plans. See note 60 *supra*. The 1976 lawyer advertising amendments were prompted by antitrust pressures and the threat of pending litigation; the 1977 measure was impelled by a sense that the *Bates* decision compelled some form of prompt bar response. To date, neither the group legal services nor lawyer advertising amendment has been followed closely in the states. A hodgepodge of regulations has resulted, particularly on lawyer advertising.

66. Professor Thomas Morgan has gone further and argued that this lawyer pref-

The chances of pressing through this process proposals for reform that are supported by the public, but opposed by a significant segment of lawyers represented within the ABA, seem remote.⁶⁷ Even if one assumes that state and national legislative and executive forces could be rallied behind such a reform, history would suggest that the ABA is largely immune from their political pressures, and no instance is known in which a nonlawyer-sponsored measure has been successfully urged upon a state supreme court without prior approval of the ABA.⁶⁸ Given the normal close working relationship among state and local bar associations and the membership of a state's supreme court, the chances for obtaining Code amendments by court action on a state-by-state basis that would bypass the ABA are very limited.

If one despairs of the prospect of obtaining judicial approval of controversial public-supported reform, one will, as a practical matter, have exhausted the traditionally available methods for effecting change in the regulation of the legal profession. Historically, attempts at reform through legislative or executive action have not been successful. This is so because, as the following section will demonstrate, the inherent powers doctrine of state constitutional law precludes any state government agency but the state supreme court from regulating the behavior of attorneys.

IV. FUNCTION OF THE INHERENT POWERS DOCTRINE

State supreme courts maintain almost exclusive control over the form and process of attorney regulation and discipline through the

erence emerges as a rigid, pervasive pattern from the ABA Code. See Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977).

67. A recent example is the tortuous path taken by the proposal that eventually became the 1976 ABA amendment on lawyer advertising. An original proposal by the ABA ethics committee was strongly supported by federal antitrust officials, but was withdrawn by the ethics committee that drafted it in the face of strong internal bar opposition. A much weaker amendment emerged from the ABA House of Delegates. See 44 U.S.L.W. 2288 (1975) (original standing committee proposal to liberalize advertising restrictions to permit extensive media advertising); *ABA Committee Backs Dropping Ban on Advertising, Urges Code Changes to Permit Responsible Publicity*, [1975] ANTITRUST & TRADE REG. REP. (BNA) No. 742, at A-19 (tentative approval of December advertising proposal by antitrust official); *ABA Group Delays Major Revision of Advertising Rules: Offers Limited Proposal to Expand Information on Lawyers*, [1976] ANTITRUST & TRADE REG. REP. (BNA) No. 750, at A-20 (withdrawal of original liberal amendment proposal by standing committee); *ABA Mid-Year Meeting*, 44 U.S.L.W. 2389, 2390 (1976) (adoption by House of Delegates of mild advertising amendment to Code, which was revised on House floor motion to remove permission for advertising in a "directory published by a bona fide consumers' organization").

68. A review of variations in the state-by-state versions of the Code suggests that they are typically in the interest of lawyers or their clients, as opposed to the public. See generally ANNOTATED CODE, *supra* note 55.

little understood inherent powers doctrine.⁶⁹ The doctrine is said to find its source in the separation of powers principle that is either express or implied in state constitutions. A few state constitutions explicitly provide that this separation of powers principle empowers their supreme courts to regulate the practice of law.⁷⁰ Most state constitutions, however, say nothing about the subject. But even in the absence of explicit constitutional or legislative authorization, courts have found in the separation of powers theory an implied authority to supervise attorneys as a part of their inherent powers to do what is necessary and proper concerning the conduct of traditional judicial business.⁷¹ As applied to the disciplinary control of lawyers, the inherent powers doctrine posits that the judicial branch, as the agency of state government chiefly concerned with legal disputes and chiefly reliant upon attorneys for the representation of clients' interests before the courts, is the proper branch to regulate attorneys.⁷²

69. State supreme courts have flexed their inherent powers muscle in three areas—court rulemaking, court budgeting, and attorney regulation. For discussions of rulemaking, see Kay, *The Rule-Making Authority and Separation of Powers in Connecticut*, 8 CONN. L. REV. 1 (1975); Levin & Amsterdam, *Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1963). For discussions of court budgeting, see C. BAAR, *SEPARATE BUT SUBSERVIENT: COURT BUDGETING IN THE AMERICAN STATES* (1975); Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975 (1972); Comment, *State Court Assertion of Power to Determine and Demand Its Own Budget*, 120 U. PA. L. REV. 1187 (1972).

70. See, e.g., ARK. CONST. amend. XXVIII; FLA. CONST. art. 5, § 23; MONT. CONST. art. VII, § 2(3), construed in *In re Senate Bill No. 630*, 164 Mont. 366, 523 P.2d 484 (1974).

71. See Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law—A Proposed Delineation*, 60 MINN. L. REV. 783, 784-86 (1976) [hereinafter cited as Note, *Inherent Power*]; Note, *Admission to the Bar and the Separation of Powers*, 7 UTAH L. REV. 82 (1960); Comment, *Separation of Powers: Who Should Control the Bar?*, 47 J. URB. L. 715, 721-23 (1969).

72. See Note, *Inherent Power*, *supra* note 71, at 784-85. See generally H. DRINKER, *supra* note 2, at 41-42; L. PATTERSON & E. CHEATHAM, *THE PROFESSION OF LAW* 33-36 (1971). This affirmative aspect of inherent powers goes much further than the narrow basis for its justification. For example, all courts claim the power to discipline lawyers for their acts in nonlitigation representations and even for acts in nonlawyers' roles. See, e.g., *Lewis v. State Bar*, 9 Cal. 3d 704, 511 P.2d 1173, 108 Cal. Rptr. 821 (1973); *Attorney Grievance Comm'n v. Silk*, 279 Md. 345, 369 A.2d 70 (1977); *In re Paulsrude*, 248 N.W.2d 747 (Minn. 1976). Regulation also reaches further than its justification in another direction because of the doctrine that only lawyers may engage in the practice of law. This is defined in very broad terms so as to extend far beyond court appearances to include writing wills, preparing contract documents for real estate sales, and the like. See, e.g., *Florida Bar v. Larkin*, 298 So. 2d 371 (Fla. 1974) (retired Illinois lawyer giving advice on wills); *Lukas v. Bar Ass'n*, 35 Md. App. 442, 371 A.2d 669 (1977) (representation of employees before County Personnel Board and Workman's Compensation Commission; drafting of agreements); *Cowern v. Nelson*, 207 Minn. 642, 290 N.W. 795 (1940) (real estate broker drafting conveyances). See generally Comment, *Control of the Unauthorized Practice of Law: Scope of Inherent*

This may be said to be the affirmative aspect of inherent powers, enabling the courts to regulate the activities of attorneys who appear before them even in the absence of express constitutional or statutory authorization.⁷³ But the doctrine goes much further. Its negative expression is that no branch of government other than the courts may regulate attorneys. Most legislative or administrative attempts to regulate the practice of law are therefore held unconstitutional even in instances where the courts have not actually provided any regulation and the regulation proposed by another branch does not otherwise offend the policy objectives of the judiciary.⁷⁴

From a purely doctrinal point of view, there seems little reason to maintain the negative aspect of the inherent powers doctrine in such vigorous form as it is found currently in many states. To the extent that sharing power to regulate attorneys poses no threat to the separation of powers principle or to the continued vitality of the judicial branch,⁷⁵ it hardly seems necessary to resist all efforts by

Judicial Power, 28 U. CHI. L. REV. 162 (1960). A related notion is that courts possess the inherent power to order "integration" of all attorneys into a unified state bar. See, e.g., *In re Integration of the Bar*, 216 Minn. 195, 200, 12 N.W.2d 515, 518 (1943) (dictum).

73. See *Ex parte Bradley*, 74 U.S. (7 Wall.) 364, 367 (1868); *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856); *Stratmore v. State Bar*, 14 Cal. 3d 887, 538 P.2d 229, 123 Cal. Rptr. 101 (1975) (suspension of attorney for conduct prior to admission to bar); *Wallace v. Wallace*, 225 Ga. 102, 109-12, 166 S.E.2d 718, 723-24, *cert. denied*, 396 U.S. 939 (1969); *In re Greathouse*, 189 Minn. 51, 53-55, 58, 248 N.W. 735, 737, 739 (1933) (disbarment for activity not covered by antisolicitation statute).

74. See, e.g., *Board of Comm'rs of Ala. State Bar v. State ex rel. Baxley*, 295 Ala. 100, 324 So. 2d 256 (1975) (invalidating statute that limited reexamination privileges of bar applicant); *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973) (statute dealing with funds collected from attorneys for purpose of attorney discipline unconstitutional); *In re Tracy*, 197 Minn. 35, 43-47, 266 N.W. 88, 92-93 (statute of limitations on attorney discipline unconstitutional), *modified on rehearing*, 197 Minn. 47, 267 N.W. 142 (1936). The negative aspect of inherent powers is relatively new. Apparently the first decision invalidating legislation on this ground was *In re Mosnes*, 39 Wis. 509 (1876). The perhaps cynical view occasionally has been expressed that the holding that the disbarment of attorneys is strictly within the judicial prerogative may be traceable to the collegial instincts of protectiveness that judges feel for other members of the law profession. See Brown, *Administrative Commissions and the Judicial Power*, 19 MINN. L. REV. 261, 288 (1935).

75. See, e.g., *Ratterman v. Stapleton*, 371 S.W.2d 939, 941 (Ky. 1963); *Clark v. Austin*, 340 Mo. 467, 482-99, 101 S.W.2d 977, 986-96 (1937) (concurring opinion); *In re Salary of Juvenile Director*, 87 Wash. 2d 232, 248-51, 552 P.2d 163, 172-74 (1976); Note, *Inherent Power*, *supra* note 71, at 799-803. Since its decision in *Sharood v. Hatfield*, 296 Minn. 416, 210 N.W.2d 275 (1973), in which the Minnesota Supreme Court suggested that the separation of powers doctrine prevents branches of government other than the judiciary from regulating the practice of law, the Minnesota court has, in a case involving court budgeting, taken a more restrained position. The new approach essentially employs a "necessary to the performance of the judicial function" standard. See *In re Clerk of Lyon County Courts' Compensation*, 308 Minn. 172, 181, 241 N.W.2d 781, 786 (1976).

legislatures to regulate the legal profession.⁷⁶ For almost a century the Constitution of Indiana provided that any person could practice law in that state's courts, whether admitted by the courts or not.⁷⁷ Even thus stripped of all inherent power to control admission to the bar, the Indiana courts obviously were able to perform their judicial functions.⁷⁸ Particularly on matters that affect the lawyer-client relationship or that deal with fundamental issues of the workings of the adversary system of adjudication, there seems no solid reason to rely exclusively on the rulemaking of courts to protect the public against possible overreaching by lawyers. In fact, some of the state supreme courts that have been most virulent in their assertion of the negative aspect of the inherent powers doctrine may have recognized this and may simply have been engaging in judicial saber-rattling. By timely compliance, some of these courts "as a matter of comity" occasionally have accepted legislative initiatives that otherwise would appear to have been subject to invalidation under the inherent powers doctrine.⁷⁹

76. In most of the instances referred to in note 74 *supra*, it would be difficult to argue convincingly that the invalidated legislation threatened in any significant way the ability of the judicial system to hear and decide cases. On the other hand, some applications of the negative aspect of inherent powers do involve threats that are immediate, real, and extreme. *See, e.g.,* *People ex rel. Conn v. Randolph*, 35 Ill. 2d 24, 219 N.E.2d 337 (1966) (ordering state to compensate court-appointed attorney beyond statutory limits for extraordinary and ruinous expenses necessarily incurred in providing criminal defense mandated by due process).

77. *See* IND. CONST. art. VII, § 21 (1851, repealed 1932). Drinker lists Michigan, New Hampshire, Maine, and Wisconsin as having either statutes or constitutional provisions during the latter part of the nineteenth century that provided for essentially universal legal practice. *See* H. DRINKER, *supra* note 2, at 19. Dean Griswold recalled a similar statutory enactment in Massachusetts, in force from 1790 to 1930, under which any person—including, reportedly, a disbarred attorney—could appear in Massachusetts courts as attorney for another if armed with a written power of attorney. *See* E. GRISWOLD, *LAW AND LAWYERS IN THE UNITED STATES* 15-16 (1965).

Scattered remnants survive. In Oregon a nonlawyer may still represent another person in civil or criminal actions in a justice court. *See Oregon State Bar v. Wright*, 573 P.2d 283, 289 (Or. 1977).

78. Another prominent example is England, where the discipline of both barristers and solicitors is today controlled by statute. *See* Leach, *The New Look in Disciplinary Enforcement in England*, 61 A.B.A.J. 212 (1975).

The control of attorneys by courts in England from the very beginning of the common law era was pursuant to and accompanied by statutory regulation. *See, e.g.,* 2 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 313 n.11, 314 n.8, 315, 317 (4th ed. 1936); B. LYON, *A CONSTITUTIONAL AND LEGAL HISTORY OF MEDIEVAL ENGLAND* 439 (1960); T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 217-19 (5th ed. 1956); F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW* 211 n.6, 213 n.2, 215-16 (2d ed. 1923). *See generally* Note, *Admission to the Bar and the Separation of Powers*, 7 UTAH L. REV. 82, 83-84 (1960).

79. *See* notes 89-90 *infra*; *cf. State ex rel. Reynolds v. Dinger*, 14 Wis. 2d 193, 109 N.W.2d 685 (1961) (acceptance of state agency definition of scope of unauthorized practice of law in real estate area).

Nonetheless, the power of a state legislature to intervene in a major way in the regulation of the legal profession probably must be regarded as subject to grave doubt in most jurisdictions. Given this fact, it seems unlikely that a state legislature would attempt to enact and enforce a reform of the legal profession absent extreme provocation. It is possible that such an effort by a legislature would prompt the state supreme court to move in a similar direction, but the timing and distance of that movement would be largely beyond effective legislative control.⁸⁰

Finally, it should be emphasized that the negative aspect of the inherent powers doctrine seems not to enjoy great current acceptance among federal judges. Perhaps because the life tenure conferred by the Constitution upon federal judges⁸¹ provides them with sufficient political independence—including independence from the organized bar—the federal courts have willingly accepted a number of legislative regulations of attorneys without questioning the competence of the legislative branch to act.⁸² For example, in *Goldfarb v. Virginia*

80. See, e.g., La Belle, *New Disciplinary Rules for Michigan Attorneys*, 54 JUDICATURE 154 (1970). The inherent powers barrier to regulation by any branch other than the judiciary would seem to place squarely upon the courts the responsibility for any shortcomings in the structure and workings of a state's system of attorney regulation.

81. See U.S. CONST. art. 3, § 1.

82. The regulation of attorneys in the federal courts, from the beginning, has been pursuant to legislative enactment. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73 (current version at 28 U.S.C. § 1654 (1970)). The Supreme Court has held that Congress may regulate the practice of law by permitting nonlawyers to appear in adversary proceedings in the Patent Office. See *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 403-04 (1963).

Not inconsistently, several decisions of the Supreme Court support an affirmative assertion of inherent powers by federal courts in the absence of legislation or administrative regulation. See, e.g., *Link v. Wabash R.R.*, 370 U.S. 626, 629-33 (1962) (power of trial court to dismiss on own motion for want of prosecution); *Ex parte Peterson*, 253 U.S. 300, 310 (1920) (inherent power to appoint an auditor to simplify issues for jury and to impose costs on parties); *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227-28 (1821) (dictum) (inherent power of court to punish for contempt); cf. *Jurney v. MacCracken*, 294 U.S. 125 (1935) (inherent power of Congress to punish contumacious hearing witness by contempt). The Court in *Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1857), did state that the power of the courts to disbar an attorney is exclusive. But the case also inconsistently held that the disbarment challenged in the case was authorized by statute. Cf. *United States v. Howard*, 440 F. Supp. 1106, 1109-13 (D. Md. 1977) (federal speedy trial act unconstitutionally infringes upon judiciary's power in violation of separation of powers doctrine); ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 152 (1936) (lawyer advertising unethical despite any attempt by Congress to permit attorneys to publicize a specialty in patent law); *House Broadens Code's "Publicity in General" Rules at Midyear Meeting in Philadelphia*, 62 A.B.A.J. 470, 477 (1976) [hereinafter cited as *Publicity Rules*] (ABA resolution opposing on inherent powers ground a proposed Act of Congress establishing professional discipline system for federal courts).

State Bar,⁸³ the United States Supreme Court held that federal antitrust legislation outlawed attorney minimum fee schedules. In contrast to similar litigation that had previously arisen in state courts,⁸⁴ the Supreme Court did not hesitate to concede that Congress was fully competent to apply the antitrust legislation to lawyers.⁸⁵

V. STRATEGIES FOR PUBLIC PARTICIPATION IN REGULATION OF THE LEGAL PROFESSION

Given the existing barriers to public participation,⁸⁶ there are a limited number of means by which nonlawyers can be empowered to speak with an effective voice on the regulation of the legal profession. One approach would be to rely upon voluntary action by courts or bar associations. A second approach would be to rely upon congressional intervention in order to immunize nonjudicial reform from the deadening effect of the negative aspect of the inherent powers doctrine. A third approach would be to obtain amendment of state constitutions to eliminate the negative aspect of the inherent powers doctrine and thus to empower state legislatures as well as state courts to regulate attorney conduct. Of these three, the most appealing from several points of view seems to be the state constitutional amendment method.

A. VOLUNTARY BAR OR STATE SUPREME COURT ACTION

In recent years, limited success has been achieved in some jurisdictions in bringing a nonlawyer point of view to bear on some aspects of attorney discipline. The District of Columbia Bar recently established a nonlawyer citizens' advisory group.⁸⁷ Some states have recently had nonlawyer members appointed to the governing bodies of state bar associations,⁸⁸ and some state supreme courts have added

83. 421 U.S. 773 (1975).

84. See, e.g., *In re Estate of Freeman*, 34 N.Y.2d 1, 9, 311 N.E.2d 480, 484, 355 N.Y.S.2d 336, 340 (1974) (in view of the history of nearly exclusive judicial regulation of the practice of law, court would construe the state antitrust statute not to apply to the practice of law).

85. See 421 U.S. at 786-92 (rejection of "learned profession" and "state-action" arguments against enforcement of Sherman Act against lawyers).

86. For the sake of simplicity, it will be assumed that all of these barriers, with noted exceptions, will stay in place in much their present form. But in fact it is likely that current nonlawyer pressures upon the legal profession will produce strategic retreats by the organized bar and by the courts on selective fronts.

87. See *Proposal for Comment: 3 Lay Members on Bar's Board*, D.C. B. REP., January 1978, at 4.

88. See, e.g., CAL. BUS. & PROF. CODE § 6013.5 (West Supp. 1977). The State Bar of Wisconsin has recently proposed a similar addition of nonlawyers to its governing

nonlawyer representatives to hearing agencies that decide attorney discipline cases.⁸⁹ A related development is the recent enactment of legislation that empowers Minnesota's Attorney General to intervene in pending attorney discipline cases.⁹⁰ Because of the greater political responsiveness of the Attorney General, the legislature may have hoped that his participation in disciplinary proceedings would place before the courts viewpoints that might not be adequately represented by the established bar.

It remains to be seen whether any of these reforms will allow nonlawyers to have a significant impact on the formal rules applied by bar regulatory groups or the priorities that bar regulators set for themselves.⁹¹ The prospect for such an outcome seems limited. One

board. See 63 A.B.A.J. 1536 (1977).

On at least one occasion, the nonlawyer members of the California governing board have differed sharply with the lawyer members. The dispute arose over a legislative proposal that would have required lawyers to include in client billings information about state agencies that assisted consumers on complaints over services and bills. See Los Angeles Times, May 14, 1977, § 2, at 1, col. 2.

A more recent pressure has come from the Antitrust Division of the Justice Department. Policy-level officials of the Division have warned that the absence of nonlawyers from bar governing boards may undercut the ability of lawyer-dominated bar groups to avoid violating the federal antitrust laws. See *Justice Department Eyes New Bar Targets*, 63 A.B.A.J. 299 (1977).

89. California, Michigan, Minnesota, and Washington are among the several jurisdictions that recently have added nonlawyer members to bar disciplinary agencies. See J. AUERBACH, *supra* note 47, at 302 n.79; Lobe, *supra* note 43, at 17.

The California membership change was accomplished by legislation, see CAL. BUS. & PROF. CODE § 6086.6 (West Supp. 1977), that passed by overwhelming majorities in both houses of the state legislature. See *Non-lawyers to Serve on California Bar Board*, B. LEADER, November 1975, at 7, 8. In 1973, Minnesota became the first state to include nonlawyers on disciplinary panels. The change was made by the Minnesota Supreme Court after legislation requiring that a third of the members be nonlawyers had already passed one house of the state legislature. See Reavill, *Professional Responsibility and Discipline*, 30 BENCH & B. MINN., July 1973, at 45, 45-46.

One of the reforms effected in England by the Solicitors Act, 1974, ch. 47, § 46 (3)(b), was to require participation by persons who are neither solicitors nor barristers in Law Society disciplinary hearings. See Note, *Professional Discipline of Solicitors in England*, 75 MICH. L. REV. 1732, 1746-47 (1977).

90. As with nonlawyer membership on the lawyer discipline agency itself, the change in the Minnesota Supreme Court rules providing for the participation of the Attorney General quickly followed enactment of legislation that purported to require such participation. See Act of April 13, 1976, ch. 304, § 4, 1976 Minn. Laws 1142 (codified at MINN. STAT. § 481.15(3) (1976)); MINN. R. LAWYERS PROFESSIONAL RESPONSIBILITY 6(c) (adopted Nov. 1, 1976). In some jurisdictions the state attorney general historically has been the customary prosecutor of formal disciplinary actions against attorneys. See, e.g., DISCIPLINARY CODE WYO. STATE BAR R. V(e).

91. See, e.g., Reavill, *supra* note 89, at 46 (legislatively coerced presence of nonlawyers on disciplinary agency will enhance agency credibility and bring lay point-of-view to agency).

It may also be noteworthy that the ABA on recent occasions has recommended

is tempted to believe that most of these reforms were initiated, and are being maintained, more as public relations efforts than as genuine attempts to change the rules and practices of attorney discipline in a radical way. For example, if the presence of public members on bar regulatory bodies leads to a significant expansion of the obligations of attorneys, powerful forces from within the legal profession will likely be brought to bear upon courts to dampen this public influence, either through structural retrenchment or selective recruitment of pro-lawyer public members. There is no reason to think that the ability of courts to resist such bar pressures will be greater now than in the past.

B. FEDERAL INTERVENTION

Federal legislative action rather clearly has the potential to break the monopoly of the bench and bar over attorney discipline in the states. Because of the supremacy clause of the Federal Constitution,⁹² the separation of powers rationale employed by state supreme courts to ward off regulatory efforts by state legislatures is simply unavailing against Congress.⁹³ Moreover, federal legislative action may be attractive to reformers because of the greater exposure to media coverage of reform measures pursued at the national level and the relatively greater simplicity of dealing with one legislative group instead of fifty.

that nonlawyers play a part in formulation of policy on such matters as specialization of law practice and lawyer referral services. See *Lawscope: House OK's Guidelines for Specialization*, 64 A.B.A.J. 326 (1978); 64 A.B.A.J. 323 (1978).

92. U.S. CONST. art. 6, cl. 2.

93. Cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (federal antitrust legislation regulates attorneys' price-fixing); *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379 (1963) (United States Patent Office may authorize nonlawyer to practice patent law in Florida despite attempt by Florida Supreme Court to enjoin him from doing so); *Baker v. Carr*, 369 U.S. 186, 210-11 (1962) (separation of powers confines the federal branches of government only vis-à-vis each other, not with respect to branches of state government).

An argument could also be made that because Congress is precluded by the intergovernmental immunities doctrine from legislatively affecting the "integral governmental functions" of a branch of state government, it is thus prevented from applying federal regulatory laws to inconsistent state court regulation of attorneys. See generally *National League of Cities v. Usery*, 426 U.S. 833 (1976) (because of tenth amendment strictures, Congress may not act under the commerce clause to force state compliance with an extension of wage and hour requirements to state employees) (overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)). The argument seems not to have been addressed in recent cases involving state court regulation of lawyers. If raised, it perhaps could be met by simply observing the great practical difference between the governmental functions of lawyers in private practice and public employees who are on the public payroll and involved in making state policy. Under such a view the role of attorneys would not involve "integral governmental functions."

Some reform measures involving the legal profession have been pursued at the national level in recent years. Perhaps the high-water mark of these efforts was reached in the series of political maneuverings that produced the 1974 congressional hearings sponsored by then Senator Tunney.⁹⁴ The hearings concerned the perennial problem of expanding the availability of legal services, and they may have contributed to the subsequent passage of legislation that may make prepaid legal insurance a viable way of financing legal services for many employed persons.⁹⁵ Aside from this, however, Congress seems likely to ignore efforts further to federalize the practice of law.⁹⁶

Nor should Congress be encouraged to undertake the task of regulating the legal profession. The long tradition of state regulation of attorneys would by itself generate resistance to any such initiative by Congress. In addition, the needs and problems of attorney discipline are complex and changing. Congressional action would almost certainly be episodic, and amendments to any original formulations would probably be difficult to obtain. An attempt to supplement federal legislation and to achieve flexibility by creation of a federal agency broadly empowered to deal comprehensively with attorney discipline is simply unthinkable as a political matter. Moreover, the need for nonjudicial regulation varies significantly from state to state, depending on the extent to which local courts have permitted state legislative and executive activity. There is thus no need for a nationally uniform resolution of the perceived problem of inadequate lawyer regulation. Local voices are beginning to have an impact in local

94. See *Organized Bar Hearings*, *supra* note 60. Senator Tunney and the chief counsel to the subcommittee enlarged upon their views in Tunney & Frank, *Federal Roles in Lawyer Reform*, 27 STAN. L. REV. 333 (1975).

95. One major development in this regard was the enactment of the Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1381 (Supp. V 1975)), which among other things provides for prepaid legal service plans jointly financed by employers and employees. See 29 U.S.C. § 1002(1)(A) (Supp. V 1975). The Tunney hearings also occurred during the same session that produced the Federal Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 Stat. 378 (codified in 42 U.S.C. §§ 2996-2996l (Supp. V 1975)). For a recent, thorough analysis of the problems of public financing of legal services, see Pfenningsdorf & Kimball, *Legal Service Plans: A Typology*, 1976 AM. B. FOUNDATION RESEARCH J. 411.

96. In 1975, Senator James Buckley introduced legislation that would have provided for uniform national discipline of attorneys practicing in federal courts and would have authorized United States Attorneys to prosecute discipline actions against them. See S. 2723, 94th Cong., 1st Sess. (1975). The proposal was vigorously opposed by the ABA. See *ABA House of Delegates Takes Stand on Federal Issues*, THIRD BRANCH, February 1976, at 3, 4; *Publicity Rules*, *supra* note 82, at 477. A similar exchange occurred in 1971-1972 when Senator Buckley proposed similar legislation. See S. 2039, 92d Cong., 1st Sess. (1971); Jaworski, *Association Confronts Challenges of the 70's*, 58 A.B.A.J. 920, 922 (1972). Neither bill progressed far enough to become the subject of hearings in committee.

regulation, and they seem more likely to be able to achieve the flexibility needed for experimentation if federal intervention is kept to a minimum.

Recent interest among the federal judiciary in upgrading the attorney disciplinary process in the federal courts is not inconsistent with this view. Currently pending is an ambitious project fostered by Chief Justice Burger and the Federal Judicial Center to provide for much more vigorous enforcement of the Code of Professional Responsibility among lawyers admitted to practice in the federal courts.⁹⁷ The ABA has shown little enthusiasm for the project,⁹⁸ but, even if the current proposals are adopted, the reform quite likely would not go much beyond the ABA Code of Professional Responsibility in articulating standards for the legal profession. In addition, these proposals would not be preemptive of state court control over attorney discipline in contexts other than federal court appearances.

C. STATE CONSTITUTIONAL AMENDMENT

A remaining option that may be worth pursuing in some states would be amendment of state constitutions to empower state legislatures to deal with matters of attorney regulation. The constitutional amendment could require that bar disciplinary agencies contain substantial nonlawyer membership or, more broadly, could provide that the legislature of the state may promulgate rules of attorney conduct and methods for enforcing them that are binding upon both attorneys and courts.⁹⁹ Such an amendment would have to be carefully drafted, for, while only a state constitutional principle of separation of powers is at the base of the inherent powers doctrine, the cases construing that doctrine suggest that, if a state constitutional amendment revoking the negative aspect of inherent powers is to be effective, it would have to express clearly the extent of the legislature's power to act in the absence of judicial approval.¹⁰⁰

97. See *Lawscope: Bar Leaders Debate Federal Discipline Rules*, 63 A.B.A.J. 308 (1977); *Lawscope: Burger Backs Tougher Discipline*, 63 A.B.A.J. 307 (1977); *Lawscope: Judicial Conference Eyes Uniform Federal Rules*, 63 A.B.A.J. 163 (1977). The United States Court of Appeals for the Second Circuit has recently proposed a rule providing for the discipline of attorneys admitted in that court. See 46 U.S.L.W. 2292 (Dec. 6, 1977).

98. See *Lawscope: Discipline-rules Action Delayed by Ad Debate*, 63 A.B.A.J. 1181 (1977).

99. An instance of a state constitutional amendment that specifically overrode a state supreme court inherent powers decision that had broadly expanded the area of lawyer monopoly in real estate transactions occurred in Arizona in 1962. See ARIZ. CONST. art. 26, § 1.

100. But cf. *City of Thornton v. Horan*, 556 P.2d 1217, 1221 n.1 (Colo. 1976) (dissenting opinion) ("Clearly, a statute, or state constitutional provision to the effect

Politically, the state constitutional amendment approach may prove more successful, particularly if it is true that the prospects for federal congressional action are very limited. Target states presumably would be chosen where antilawyer sentiment runs highest and perhaps where public participation in the process of constitutional amendment is allowed.

The point of the constitutional amendment, of course, would be to abolish the negative aspect of the inherent powers doctrine, although it would leave in place the much more defensible affirmative aspect, thereby permitting courts to regulate the practice of law in the absence of inconsistent legislation. The largely artificial wall between courts and legislatures created by the negative aspect of inherent powers would be replaced with the same legal relationship between the legislature and judiciary that now obtains with respect to regulation of accountants, barbers, plumbers, and doctors.¹⁰¹ To the extent that judicially approved rules for the regulation of lawyers would not give rise to strong public opposition, it seems unlikely that legislatures would attempt to intervene. But where the courts fail to achieve significant progress towards ends thought desirable, the state legislature could change both the substance of lawyer regulations and, where necessary, the structural arrangements for their enforcement.

VI. CONCLUSION

It is important to reiterate that this Article does not advocate any particular reform of the system of lawyer regulation. It is not clear that expansion of the role of the state legislature will always and everywhere lead to improvement in lawyer regulation or to the ultimate goal of improving lawyer contacts with clients, adversaries, and government institutions. But the fact remains that lawyers as a profession are uniquely insulated from the normal workings of the political process. There seems to be neither theoretical nor practical justification for this specially protected posture. Nor can one conclude from observation of the state of the profession and its work that the public is better served by a bar whose regulation is immunized from public scrutiny.

Past experience with attempts to reform the regulatory mechanisms of other trade and industry groups should caution any reformer of the legal profession. The road to reform is long and ultimately may

that members of *this* court serve 'at the pleasure' of the Governor, or the General Assembly, would violate the separation of powers doctrine.") (emphasis in original).

101. See, e.g., MINN. STAT. §§ 154.01-.26 (1976) (barbers); *id.* §§ 326.37-.45 (plumbers).

produce a relatively unspectacular compromise of original objectives. Moreover, one should not proceed with the illusion that even ideal reforms would suffice to make all lawyers likable persons engaged enthusiastically and productively in fair-minded pursuit of just solutions to social problems. Nor can anyone guarantee that the fruits of any substantial reform would be seen year after year in the same fresh form as when first achieved. The tendency over time probably would be for lawyers to regain ascendancy over bar disciplinary forces after reformers and legislators had directed their attention and energies to other projects more pressing and challenging than assuring the continuance of achieved successes. Nevertheless, reform at least may blunt the edges of the worst excesses and, for the period of its success, create renewed public expectations about the value of the practice of law when it is pursued by persons made newly aware of the public obligations of their profession and their work.